RECORD AND BRIEFS.

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No. 15-1191

In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

v.

LUIS RAMON MORALES-SANTANA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

I. The rules established by 8 U.S.C. 1401 and 1409 for conferral of citizenship on children born abroad out of wedlock are fully consistent with the Constitution 2
   A. Congressional enactments governing immigration and naturalization are subject to deferential review 2
   B. In any event, the rules established by Sections 1401 and 1409 are substantially related to important government interests 4
      1. Respondent's congressional-purpose analysis is fatally flawed 4
      2. Because Congress legislated to advance two interests that sometimes competed, it could not simultaneously advance both interests in every application of the statutory scheme 11
      3. Congress could properly predicate the acquisition of U.S. citizenship at birth on the legal status of a child's parents at the moment of the child's birth 14
II. The court of appeals exceeded its constitutional and statutory authority by extending U.S. citizenship to respondent 17
III. Under the existing statutory scheme, respondent did not acquire U.S. citizenship at birth 21

TABLE OF AUTHORITIES

Cases:

Boumediene v. *Bush*, 553 U.S. 723 (2008) 22
Fiallo v. *Bell*, 430 U.S. 787 (1977) 2, 3, 13
Fleming v. *Page*, 50 U.S. (9 How.) 603 (1850) 22

Cases—Continued: Page

Flores-Villar v. *United States*, 564 U.S. 210 (2011) 15
Heckler v. *Mathews*, 465 U.S. 728 (1984) 19
King v. *Earl of Crewe ex parte Sekgome*, 2 K.B. 576 (C.A. 1910) 22
Mathews v. *Diaz*, 426 U.S. 67 (1976) 3
Matter of V—, 9 I. & N. Dec. 558 (B.I.A. 1962) 22
Nguyen v. *INS*, 533 U.S. 53 (2001) 3, 4, 10, 13, 21
Rosenberg v. *Fleuti*, 374 U.S. 449 (1963) 21
United States v. *Wong Kim Ark*, 169 U.S. 649 (1898) ... 2, 17

Constitution and statutes:

U.S. Const. Art. I, § 8, Cl. 4 (Naturalization Clause) 2
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 6
8 U.S.C. 1252(b)(5)(A) 17
8 U.S.C. 1401 (1958) ..... *passim*
8 U.S.C. 1401(a)(3) (1958) 5, 14
8 U.S.C. 1401(a)(7) (1958) 6, 13, 14, 19, 21, 22
8 U.S.C. 1409 (1958) ..... *passim*
8 U.S.C. 1409(a) (1958) 5, 6, 14
8 U.S.C. 1409(c) (1958) 5, 6, 19
8 U.S.C. 1427 20
8 U.S.C. 1431 (1958) 20
8 U.S.C. 1433 (1958) 20
8 U.S.C. 1445 20
Nationality Act of 1940, ch. 876, 54 Stat. 1137 6

Miscellaneous: Page

7 C.J. (1916) 9

Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 Yale L.J. 2134 (2014) 10

William Edward Hall, *A Treatise on Int'l Law* (4th ed. 1895) 16

2 James Kent, *Commentaries on American Law* 231 (11th ed. 1867) 9

S. Rep. No. 1137, 82d Cong., 2d Sess. (1952) 7

Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248 (1935) 8

1 James Schouler & Arthur W. Blakemore, *A Treatise on the Law of Marriage, Divorce, Separation and Domestic Relations* (6th ed. 1921) 9

Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* (1934) 16

To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings on H.R. 6127 Superseded by H.R. 9980 Before the House Comm. on Immigration and Naturalization, 76th Cong., 1st Sess. (printed 1945) 7, 9

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Respondent challenges the constitutionality of a statutory scheme that specifies when a child born abroad with at least one U.S.-citizen parent acquires U.S. citizenship from the moment of his birth. That scheme advances important, but sometimes competing, government interests. First, it ensures that the child, through his U.S.-citizen parent's connection to the United States, has a sufficient connection to the United States to outweigh any competing claims of national allegiance; and second, within that framework, it reduces the risk of statelessness at birth. Respondent dismisses those interests, urging that the statute is simply the product of impermissible gender stereotypes and that this Court should grant him U.S. citizenship. But respondent's arguments largely ignore the text, structure, history, and operation of the relevant statutory provisions, which demonstrate the important interests the statute serves; and respondent

compounds that error by seeking relief that the courts lack authority to provide. This Court should reject respondent's arguments.

I. THE RULES ESTABLISHED BY 8 U.S.C. 1401 AND 1409 FOR CONFERRAL OF CITIZENSHIP ON CHILDREN BORN ABROAD OUT OF WEDLOCK ARE FULLY CONSISTENT WITH THE CONSTITUTION

A. Congressional Enactments Governing Immigration And Naturalization Are Subject To Deferential Review

Respondent, like other individuals born outside the United States, is not entitled as a constitutional matter to U.S. citizenship by virtue of his birth. Instead, he may acquire U.S. citizenship only if Congress has so provided in an exercise of its plenary authority "To establish an uniform Rule of Naturalization." U.S. Const. Art. I, § 8, Cl. 4; see *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702 (1898). As explained in the government's opening brief (at 13-18), Congress's exercise of that plenary authority is subject to judicial review that is highly deferential. Respondent's arguments to the contrary (Br. 15-19) are unavailing.

Respondent erroneously argues (Br. 17-18) that *Fiallo* v. *Bell*, 430 U.S. 787 (1977), does not supply the proper standard of review because the individuals asserting a violation of their rights in *Fiallo* were aliens while respondent asserts the rights of his U.S.-citizen father. Respondent concedes (Br. 17 n.6) that some of the challengers in *Fiallo* were U.S. citizens, but contends that those individuals did not assert their own equal protection rights. Respondent simply misreads *Fiallo*. At least one of the challengers in *Fiallo* was the U.S.-citizen father of a child born abroad out of wedlock who sought and was denied an immigrant

visa for his son. 430 U.S. at 790 n.3. And the plaintiffs there contended that they were denied "equal protection" by a law that discriminated against "natural fathers and their illegitimate children" based in part on "the sex of the parent." *Id.* at 791 (citation omitted). That claim is materially identical to respondent's.

Respondent also errs in asserting (Br. 18), without support, that Congress's constitutional authority over naturalization (including conferral of citizenship on persons born outside the United States) is less comprehensive than Congress's authority over the admission or exclusion of aliens. Respondent ignores this Court's reaffirmation in *Fiallo* that, "in the exercise of its broad power over *immigration and naturalization*, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" 430 U.S. at 792 (emphasis added) (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 80 (1976)); see also *Nguyen* v. *INS*, 533 U.S. 53, 72-73 (2001) (noting, but finding it unnecessary to address, statements in Court's cases "regarding the wide deference afforded to Congress in the exercise of its immigration and naturalization power") (citing *Fiallo*, 430 U.S. at 792 & n.4).

Respondent fares no better by contending (Br. 19) that he should be treated as a U.S. citizen for purposes of determining the proper standard of review rather than as an alien. For purposes of his equal protection claim, it is undisputed that respondent is *not* a citizen pursuant to 8 U.S.C. 1401 and 1409 as enacted by Congress, but rather is an alien.[1] He thus does not

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[1] Unless otherwise noted, all citations to 8 U.S.C. 1401 and 1409 are to the 1958 version of the United States Code.

seek a declaration that the statutory provisions actually enacted bestowed citizenship on him; he instead contends that he *should be* regarded as a citizen from birth *in spite of* the legislation on the books. And in doing so, he does not contend that he has any constitutional rights in seeking to become a citizen of this Nation; he relies on an asserted equal-protection right of his father. As in *Fiallo*, deferential review applies to such a claim.

B. In Any Event, The Rules Established By Sections 1401 And 1409 Are Substantially Related To Important Government Interests

As the government has established in its opening brief (at 18-32), the scheme embodied in 8 U.S.C. 1401 and 1409 advanced two important government interests. First, it ensured that a child born abroad, through his U.S.-citizen parent's connection to the United States, had a sufficiently strong connection to the United States at birth to outweigh any competing claims of allegiance and to warrant conferral of U.S. citizenship at birth. See *Nguyen*, 533 U.S. at 65, 67-68 (recognizing purpose of Section 1409 to ensure that the child has sufficient ties to the United States). Second, within that framework, it reduced the risk that a child born abroad to a U.S. citizen would be stateless at birth. Respondent's challenges to that showing by the government are without merit.

1. Respondent's congressional-purpose analysis is fatally flawed

a. i. As this Court explained in *Nguyen*, the Court "ascertain[s] the purpose of a statute by drawing logical conclusions from its text, structure, and operation." 533 U.S. at 67-68. It is plain from the text,

structure, and operation of Sections 1401 and 1409 that Congress required a stronger connection to the United States by the U.S.-citizen parent of a child born abroad when it could be assumed at the time of the child's birth (the relevant point in time for purposes of the statute, see pp. 14-15, *infra*) that the child was likely to be raised with competing national ties and influences than when it was likely that the child would be raised with only American family influences. See Gov't Br. 20-22. Congress thus required a shorter physical connection between a child's U.S.-citizen parent and the United States when the child's legally recognized parents were U.S. citizens. A minimal residence requirement applied under Section 1401(a)(3) when both parents were citizens and were married at the time of the child's birth (and thus were both legally recognized as parents at that time); and a one-year continuous-physical-presence requirement applied under Section 1409(c) when the child was born out of wedlock to a U.S.-citizen mother because she was at that time the child's only legally recognized parent.

Congress's statutory treatment of an unwed U.S.-citizen father confirms this purpose. When such a father took the steps required by Section 1409(a) to legally establish his relationship with his child, the child was then treated for purposes of determining citizenship at birth as if his parents had been married at the time of his birth. Under that general rule, if the mother was also a U.S. citizen, then the minimal residence requirement in Section 1401(a)(3) when there were two U.S.-citizen parents applied. But if the child's mother was an alien, the child then had two parents of *different* nationalities, thereby triggering

the ten- and five-year physical-presence requirements in Section 1401(a)(7) for children with parents of different nationalities.

Congress's purpose to reduce the risk that the child of a U.S. citizen would be born stateless is also apparent on the face of the Immigration and Nationality Act (INA or 1952 Act), 8 U.S.C. 1101 *et seq.* As explained in the government's opening brief (at 37-39), Congress amended the relevant provisions in 1952 to make clear that a child born abroad out of wedlock to a U.S.-citizen mother would be a U.S. citizen from birth (provided the mother satisfied the applicable one-year continuous-physical-presence requirement), regardless of whether his father later legitimated him during his minority. The Nationality Act of 1940 (1940 Act), ch. 876, 54 Stat. 1137, could have been construed either (i) to divest the child of U.S. citizenship if the father was an alien who later legitimated him and the U.S.-citizen mother did not satisfy the ten- and five-year physical-presence requirement for parents of different nationalities, or (ii) to leave undecided the citizenship status of such a child—until either the child's father legally established his paternity or the child reached the age of majority—and therefore to render such a child stateless at least temporarily. The 1952 Act eliminated those possibilities by providing in Section 1409(c) that "[n]othwithstanding" Section 1409(a)—*i.e.*, irrespective of whether the child's father later established a legal relationship to the child—the child would be a U.S. citizen from birth if his mother satisfied the one-year-continuous physical-presence requirement. 8 U.S.C. 1409(c). The Senate Report made that purpose explicit, explaining that the change was meant to "insure[] that the child shall have a na-

tionality at birth." S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952). Respondent complains (Br. 35) that the Report did not use the word "stateless" in explaining its purpose—but a child who has no "nationality at birth" is a child who is stateless at birth.

ii. Respondent errs in attacking (Br. 22-27, 30-38) sources establishing that, in most of the world, the mother of a child born out of wedlock was the only legally recognized parent at the time of the child's birth. Respondent does not contest (see Br. 32) that Congress heard testimony from the Assistant Legal Adviser in the Department of State that, when a child is born out of wedlock, he "only has one legal parent" unless or until his father legitimates him. *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings on H.R. 6127 Superseded by H.R. 9980 Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 62-63 (printed 1945) (1940 Hearings) (cited at Gov't Br. 29); see also *id.* at 431. Respondent instead asserts that that statement is irrelevant because it did not sufficiently tie that information to a congressional purpose of reducing statelessness. But that statement demonstrates that Congress was made aware in 1940 that applicable legal rules did not generally recognize the father of a child born out of wedlock as a legal parent at the time of the child's birth, and that rule explains why Congress chose the means it did to reduce statelessness while still ensuring that the child would have a sufficient connection to the United States at birth.

Respondent also quibbles (Br. 23-26) with the secondary sources cited by the government (Gov't Br. 28-30) to establish the legal rules applicable to parents of

children born out of wedlock. His primary complaint is that those sources state that, in *jus sanguinis* countries, a child born out of wedlock could acquire citizenship at birth only through his mother—rather than stating that such a child's mother was his only legally recognized parent at birth. But the latter proposition is subsumed in the former because the *reason* such a child could acquire citizenship only through his mother is that his mother was his only legally recognized parent. That point is made explicit in the source respondent criticizes (Br. 24) for not using the phrase "legally recognized parent." That source explains that a child could take his father's citizenship only after the father took "any act legally establishing" his paternity. Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248, 258 (1935) (Sandifer) (cited in 1940 Hearings 431).

b. Respondent does not contest the importance of the two government interests manifested in the text, structure, and history of Sections 1401 and 1409, but he asserts (Br. 22-27, 30-38, 41-46) that Congress's true purpose in enacting the 1940 Act and the INA was to advance archaic stereotypes about the roles of unwed mothers and fathers with respect to their children. Respondent's contentions are deeply flawed.

For example, respondent repeatedly asserts (Br. 2, 4, 6, 8, 9, 13, 43) that Congress relied on impermissible gender-based stereotypes by "presum[ing] that mothers are the 'natural guardians' of nonmarital children and thus should enjoy a lower bar to returning to the United States with U.S.-citizen children." *Id.* at 2. But the term "natural guardian" appears only once in the legislative history of the 1940 Act (and not at all in

the legislative history of the INA), in the document explaining the code proposed by the Executive Branch. See 1940 Hearings 431. The phrase appeared (along with the phrase "guardian by nurture") in the paragraphs explaining why the proposed code applied a different physical-presence rule to the U.S.-citizen mother of a child born abroad out of wedlock "in the absence of legitimation or adjudication establishing the paternity of the child." *Ibid.* In such circumstances, the document explained, the mother alone had, by law, the right to the custody and control of her child. *Ibid.* In explaining that legal principle, the document relied on several secondary sources confirming that, in the absence of legitimation (and, therefore, from the moment of birth until the moment of legitimation, if any), the mother of a child born out of wedlock was that child's only *legally recognized* parent. See 1 James Schouler & Arthur W. Blakemore, *A Treatise on the Law of Marriage, Divorce, Separation and Domestic Relations* 740-743 (6th ed. 1921); 2 James Kent, *Commentaries on American Law* 231 (11th ed. 1867); 7 C.J. *Bastards* § 28 (1916) (all cited at 1940 Hearings 431).

To be sure, the explanatory document included quotations from those sources that used antiquated language to describe the circumstance that the mother of a child born out of wedlock was at least initially the child's only legally recognized parent. But nothing in those sources or the explanatory document suggests that any person in the Executive Branch involved in drafting the proposed code believed that, regardless of applicable legal rules, the mother of a child born out of wedlock should have been responsible for her child. And Congress's reliance on a legal rule applicable in

most of the world does not constitute either a condemnation of the fitness of unwed fathers or a presumption that such fathers will play no role in their children's lives; it merely reflects Congress's intent to establish administrable rules, based on legal relationships, governing the U.S. citizenship at birth of children born abroad. See *Nguyen*, 533 U.S. at 69.

By the same token, respondent identifies no evidence that Congress was motivated by stereotypes—rather than by the backdrop of legal rules applicable throughout the world—when it enacted the 1940 Act or the INA. In support of his contention (Br. 42) that Sections 1401 and 1409 were "shaped by contemporary maternalist norms regarding the mother's relationship with her nonmarital child—and the father's lack of such a relationship," respondent relies on the conclusions of a law professor. See Br. 7-10, 41-46 (citing Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 Yale L.J. 2134 (2014)). Respondent does not support those conclusions with even a single statement by any Member of Congress or any congressional committee involved in passage of the 1940 Act or the INA. Instead, drawing on that professor's article, respondent cites (Br. 6-10 & nn.3-4, 42) a few scattered internal memoranda from various parts of the Executive Branch that were for the most part drafted in a context unrelated to the enactment of either the 1940 or 1952 Act. And the quoted portions of the memoranda (Br. 7 nn.3-4) simply reflect the fact that the mother of a child born out of wedlock was the child's only legally recognized parent unless or until his father took steps to establish his parental status.

2. Because Congress legislated to advance two interests that sometimes competed, it could not simultaneously advance both interests in every application of the statutory scheme

a. At a number of places in his brief, respondent argues that Congress could not have been serving the two important interests identified by the government because certain applications of the statutory scheme might work against one or the other of those interests. But the interests Congress sought to advance sometimes competed, and it is thus unsurprising and untroubling that the statute did not perfectly advance both interests in every application of the statute.

Respondent argues (Br. 27-28), for example, that ensuring a sufficiently strong connection between a child born abroad and the United States could not have been Congress's purpose because Congress required only one year of continuous presence in the United States as a prerequisite for the child of an unmarried U.S.-citizen mother to acquire U.S. citizenship. As explained above, respondent is wrong because he fails to recognize that such a child would, at the time of birth, have no legally recognized parent who is an alien and who might for that reason create a competing claim of national allegiance. For the same reason, Congress required only a residence of even minimal length by one parent when a child had two legally recognized U.S.-citizen parents—including when the child was born out of wedlock to a U.S.-citizen mother and a U.S.-citizen father later legally established his paternity.

But as the government has explained (Gov't Br. 33-39; pp. 6-7, *supra*), the other reason Congress chose to impose that shorter physical-presence requirement

was to reduce the risk that a child born abroad to a U.S. citizen would be stateless at birth. Respondent does not meaningfully contest that, in most of the world where *jus sanguinis* citizenship laws applied, a child born out of wedlock was able to acquire citizenship at the time of his birth only through his mother. By facilitating the acquisition of citizenship by the child of an unmarried U.S.-citizen mother, Congress reduced the risk that such a child would have no nationality at birth. But by easing the physical-presence prerequisite, Congress required a lesser connection between the U.S.-citizen parent and the United States. That is the nature of enacting a legislative scheme that advances important but sometimes divergent interests.

Respondent similarly contends (Br. 34) that Congress was not attempting to reduce the risk of statelessness because Congress *imposed* the one-year continuous-physical-presence requirement on unwed U.S.-citizen mothers when it enacted the INA in 1952. But that is just the flip side of the coin: any additional requirements Congress imposed in order to ensure a greater connection to the United States would inevitably preclude some children of U.S. citizens from acquiring U.S. citizenship at birth, which would increase the risk that such children would be stateless at birth. This Court should reject respondent's view that, when Congress serves important but sometimes competing interests, it should be viewed as serving no legitimate interest at all. The Court should instead recognize that balancing such interests is a difficult task—and, particularly in the context of conferring U.S. citizenship on individuals born abroad, is a job for Congress.

b. Respondent also argues that Congress was not attempting to reduce statelessness because it did not eliminate the risk of statelessness in all conceivable circumstances. In particular, respondent points out (Br. 36-37) that an unwed U.S.-citizen father who could not satisfy the physical-presence requirements in Section 1401(a)(7) could cause his child to become stateless by legitimating him if his child was born to an alien mother in a *jus sanguinis* country that determined a child's citizenship through his legally recognized father (if he had one). It is true that such a child might have been rendered stateless. But it is also true that a similarly-situated child of a *married* U.S.-citizen father—a class of citizens respondent ignores—who could not satisfy Section 1401(a)(7) would face a similar risk. In both instances, that is a consequence of Congress's purpose to ensure that a child of two legally recognized parents of different nationalities had a sufficient connection to the United States to warrant conferral of citizenship. That the scheme applies with equal consequences to married and unmarried fathers belies respondent's repeated suggestions that the statutory scheme is premised on outdated assumptions about an unwed father's lack of relationship to his child.

Moreover, this Court has made clear that Congress's statutory scheme need not "be capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70. In particular, this Court has recognized that "legislative distinctions in the immigration area need not be as 'carefully tuned to alternative considerations' as those in the domestic area." *Fiallo*, 430 U.S. at 799 n.8 (citations omitted).

3. *Congress could properly predicate the acquisition of U.S. citizenship at birth on the legal status of a child's parents at the moment of the child's birth*

Respondent argues (Br. 12, 21-22, 25-26) that the government errs by focusing on the legally recognized relationship between a child born abroad and his parents at the moment of the child's birth rather than at some later unfixed date. But the purpose of the scheme embodied in Sections 1401 and 1409 is to determine which children born abroad should acquire U.S. citizenship *at birth*. In devising such a scheme, Congress necessarily focused on the status of such children—including their legal relationships (or lack thereof) with their parents—at birth. Because the father of a child born out of wedlock generally had no legally recognized relationship to the child at the time of the child's birth, Congress had no means of providing for the automatic conferral of U.S. citizenship at birth based on the U.S. citizenship of the father. Congress required such a father to undertake certain steps to legally establish his relationship to his child—requirements that were upheld in modified form in *Nguyen* and were satisfied here when respondent's father later married his mother. But once a father had taken such steps, the statutory scheme treated the child as if his parents had been married at the time of the child's birth—and, if the father satisfied the physical-presence requirements in Section 1401(a)(3) or (7), conferred citizenship on the child "as of the date of birth." 8 U.S.C. 1409(a).

Respondent relies on the unwed father's opportunity to effect conferral of citizenship through an act taken after the birth of his child to argue that the constitutionality of the statutory scheme should be

assessed either at that point or at whatever point in the future the parent or child seeks official documentation of the child's citizenship (see Br. 22). But nothing in the statutory scheme supports such an approach; indeed, the opposite is true. Even when dealing with an action that Congress knew could only take place after the child's birth (*i.e.*, legitimation), Congress made the effect of that action retroactive *to birth*—because the very purpose of Sections 1401 and 1409 was to determine which children born abroad would acquire citizenship *at birth*. See 8 U.S.C. 1401 ("Nationals and citizens of United States at birth."). Congress dealt separately with situations in which a person could acquire U.S. citizenship as of some date later in life. See p. 20, *infra*. Respondent's focus on any number of events that may or may not take place after the birth of a child also ignores Congress's plain intent in 1952 to eliminate ambiguity about whether a child was a U.S. citizen between the time of his birth and some later date. See Gov't Br. 37-39.

Respondent's unwillingness to accept that Sections 1401 and 1409 govern the acquisition of citizenship at birth leads to multiple errors in his and his amici's assessment of the international legal landscape governing the citizenship of children born out of wedlock. Respondent relies (Br. 38) primarily on an amicus brief filed in *Flores-Villar* v. *United States*, 564 U.S. 210 (2011) (per curiam), a brief that has been reproduced in this case. See Scholars on Statelessness Amicus Br. (Statelessness Scholars). Although that brief claims (*id.* at 15-17) to present a survey of other nations' laws governing the citizenship of children born out of wedlock, amici admit (*id.* at 14 n.5) that their analysis is not comprehensive because it relies

exclusively on codified provisions of law without examining case law. See *id.* at 21-22 (acknowledging that, at the relevant time, many countries had no statute governing the nationality of non-marital children). The absence of a statute specifically addressing the citizenship of children born out of wedlock does not indicate that such children either had no citizenship or were treated for citizenship purposes as if their parents were married. On the contrary, as a noted source relied on by the government (Gov't Br. 35) and by amici (Statelessness Scholars 21-22) explained, even in the absence of a statutory provision governing the question, "it [was] almost everywhere the rule that" children born out of wedlock "belong[ed] to the state of which the mother [was] subject" because, at least until paternity was established, the fathers of such children were "necessarily uncertain in law." Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* 217 (1934) (quoting William Edward Hall, *A Treatise on Int'l Law* § 69, at 238 (4th ed. 1895)). And the only secondary source that examined the laws of the countries that did address by statute the citizenship status of children born out of wedlock confirms that, at the relevant time, all but one of those countries provided that such children would take the citizenship of their mothers. Sandifer 258-259 & n.38; see Gov't Br. 29-30.

Respondent and amici also draw misleading conclusions from the data they did analyze. In particular, their assertions (Resp. Br. 37-38; Statelessness Scholars 14) that more than thirty countries did not permit children born out of wedlock to acquire citizenship from their mothers is flatly incorrect when the question is (as Congress determined it was for purposes of

Section 1409) whether a child born out of wedlock could acquire his mother's citizenship *at birth*. Amici's own brief descriptions (Statelessness Scholars 15-17) of the laws they analyzed (some of which do not address the citizenship of children born out of wedlock at all) reveal that nearly all of the laws on which they rely either did not exist when the 1940 and 1952 Acts were enacted (see *id.* at A3-A15) or limited the child's ability to acquire his mother's citizenship *only* after the child's father legally established his paternity (if he ever did). Those laws therefore support the government's argument that, in the absence of legitimation, the child's mother was his only possible source of citizenship through a parent.

II. THE COURT OF APPEALS EXCEEDED ITS CONSTITUTIONAL AND STATUTORY AUTHORITY BY EXTENDING U.S. CITIZENSHIP TO RESPONDENT

Respondent fares no better in arguing (Br. 48-52) that the court of appeals had authority to rewrite Sections 1401 and 1409 to extend citizenship to respondent and countless other unidentified individuals who were born abroad and have never had any expectation that they are U.S. citizens.

As explained in the government's opening brief (at 48-51), the power to extend citizenship to individuals born abroad is vested exclusively in the Legislative Branch and may not be exercised by courts.[2] Respondent errs in relying (Br. 50-51) on 8 U.S.C.

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[2] Respondent's amici err in relying (Constitutional Law Scholars Amicus Br. 19-21) on this Court's decision in *Wong Kim Ark*, 169 U.S. at 704, which merely eliminated an invalid statutory barrier to the Constitution's positive conferral of citizenship on all persons born within the United States and subject to its jurisdiction.

1252(b)(5)(A), which directs courts to decide nationality claims where such claims do not rely on a disputed issue of material fact. That provision concerns only the application of existing statutory provisions to the facts of particular cases; it does not authorize courts to rewrite those provisions to enlarge the category of individuals born abroad who acquire U.S. citizenship at birth.

There are, moreover, particularly strong reasons here not to relax the bar on courts' granting U.S. citizenship to individuals whom an Act of Congress deems to be aliens, because the remedy adopted by the court of appeals is manifestly contrary to congressional intent. In defending the court of appeals' extension remedy, respondent urges this Court to apply a generally more favorable rule to children born abroad out of wedlock than it applies to children born abroad to married parents. But respondent makes no effort to justify such a distinction; indeed, respondent does not even acknowledge Congress's treatment of the children of married parents. This Court cannot discern congressional intent, however, by simply ignoring the rules that Congress applied to all but one categories of children born abroad who had only one U.S.-citizen parent.

As explained in the government's opening brief (at 4, 10, 25-26), when the father of a child born abroad out of wedlock took the steps necessary to legally establish his paternity, Congress then treated his child exactly the same as if the child's parents had been married at the time of his birth. Thus, *all* legally established parents of children born abroad were subject to the same rules except unmarried mothers. If that exception to the general rule violates the Con-

stitution, the obvious solution is to eliminate the exception.[3]

Respondent protests (Br. 53-54) that under the statutory regime Congress enacted, a child born abroad out of wedlock could never obtain citizenship through a U.S.-citizen father if he was born before the father's nineteenth birthday. But that was also true of children born abroad to married U.S.-citizen fathers *and mothers* when the child's other parent was an alien. Respondent does not contend that applying physical-presence requirements as a prerequisite to acquisition of citizenship is unconstitutional in its own right, even when the result is that acquisition will not be possible in some cases. Indeed, the whole point of imposing such requirements was to prevent the acqui-

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[3] Respondent errs in suggesting (Br. 56) that the government's proposed remedy would withdraw citizenship from children born abroad between 1952 and 1986 who would qualify for citizenship under Section 1409(c). The government proposes (Gov't Br. 51) imposing the longer physical-presence requirement in Section 1401(a)(7) on children born abroad out of wedlock to U.S.-citizen mothers, but only on a prospective basis. The Court must be cognizant of the important reliance interests created by Section 1409(c) for existing U.S. citizens who obtained their citizenship by virtue of having been born abroad to unwed citizen mothers who had been physically present in the United States for a continuous period of one year before the birth (but less than the ten or five years of physical presence required by Section 1401(a)(7)). The Court should therefore not apply that longer physical-presence requirement to such mothers retroactively. *Cf. Heckler* v. *Mathews*, 465 U.S. 728, 745-750 (1984) (upholding Congress's decision to continue for certain individuals a gender-based statutory distinction that this Court had previously found to be a violation of equal protection, in order to protect reasonable reliance interests).

sition of U.S. citizenship at birth in some circumstances.

Moreover, it is untrue (see Resp. Br. 53) that Sections 1401 and 1409 were the only means by which a child born abroad out of wedlock (or to married parents) could acquire U.S. citizenship through a parent. For example, respondent's father could have filed a petition to naturalize respondent before respondent's eighteenth birthday when respondent was residing permanently in the United States with his father pursuant to a lawful admission for permanent residence, 8 U.S.C. 1433 (1958)—an avenue that directly addressed respondent's concern (see Br. 28-29) for the situation in which a child born out of wedlock formed a relationship with his U.S.-citizen father and the United States following birth. In addition, if respondent's mother had become a naturalized U.S. citizen after marrying respondent's father and before respondent's sixteenth birthday, respondent would automatically have acquired U.S. citizenship if he had been residing in the United States pursuant to a lawful admission for permanent residence. 8 U.S.C. 1431 (1958). And of course respondent could have sought naturalization in his own right once he attained the age of majority. 8 U.S.C. 1427, 1445. These various paths to citizenship must be taken into account in considering whether the provisions respondent challenges violate equal protection.

It is true that those avenues to citizenship now may be foreclosed to respondent, but that is because his parents did not take the necessary steps when he was young and because any bar to his naturalization now "is due to the serious nature of his criminal offenses, not to an equal protection denial or to any supposed

rigidity or harshness in the citizenship laws." *Nguyen*, 533 U.S. at 71. Respondent does not suggest that he has ever considered himself to be a U.S. citizen. Nor is there any evidence that he sought to be recognized as a citizen, at least before he faced the prospect of removal from the country after committing serious crimes. This Court should not intrude on Congress's plenary authority over matters of nationality by conferring citizenship on respondent—54 years after he was born and based not on any constitutional right of his own but on a perceived violation of his father's equal protection rights.

III. UNDER THE EXISTING STATUTORY SCHEME, RESPONDENT DID NOT ACQUIRE U.S. CITIZENSHIP AT BIRTH

Respondent also argues (Br. 57-59), almost in passing, that if this Court agrees with the government that Sections 1401 and 1409 do not violate equal protection, the Court should hold that respondent nevertheless acquired citizenship under those provisions as enacted. The court of appeals correctly rejected those arguments. See Pet. App. 10a-13a.

First, respondent argues (Br. 57-58) that this Court should invent a "grace period" exception to the bright-line physical-presence requirement Congress enacted in Section 1401(a)(7) and should deem his father to have satisfied that (altered) requirement. Respondent offers no guidance on how courts would evaluate the scope of a judicially-fashioned exception. And, as respondent has recognized (Br. in Opp. 27-28), Congress knew how to create grace-period exceptions and chose not to do so in this statute. That should be the end of the matter. Respondent's reliance on *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), is misplaced. The

Court in *Fleuti* construed an *existing* statutory exception to a rule specifying the consequences of a lawful permanent resident's departure from and reentry to the United States. Here, Congress did not include any such exception in Section 1401(a)(7).

Second, respondent argues (Br. 58-59) that his father satisfied the physical-presence requirement in Section 1401(a)(7) because the Dominican Republic was an "outlying possession" of the United States in 1919, when his father moved there at the age of 18. Respondent relies on the United States' military occupation of the Dominican Republic from 1916 to 1924 to support his contention. Although respondent acknowledges (Br. 58) that the term "outlying possessions" in the INA includes only American Samoa, Swains Island, and "any other territory which was, in fact and law, an outlying possession of the United States," see *Matter of V—*, 9 I. & N. Dec. 558, 661 (B.I.A. 1962), he cannot identify any authority that would establish the Dominican Republic's status "in law" as an outlying possession of the United States. Indeed, this Court has held that one nation's occupation and control of another nation's territory does not amount to de jure sovereignty over that nation or its territory. See *Boumediene* v. *Bush*, 553 U.S. 723, 754 (2008) (citing *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 614 (1850); *King* v. *Earl of Crewe ex parte Sekgome*, 2 K.B. 576, 603-604 (C.A. 1910) (Williams, L.J.)).

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For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Acting Solicitor General

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